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Nos. 98-682 and 98-752

In the Supreme Court of the United States

OCTOBER TERM, 1998

BOUCHARD TRANSPORTATION COMPANY, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

DEPARTMENT OF ENVIRONMENTAL PROTECTION OF
FLORIDA, PETITIONER

v.

BOUCHARD TRANSPORTATION COMPANY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the concursus procedure under Rule F of the Supplemental Rules For Certain Admiralty and Maritime Claims applies to claims brought under the Oil Pollution Act of 1990, 33 U.S.C. 2701 *et seq.* (1994 & Supp. II 1996).

2. Whether a federal court retains jurisdiction notwithstanding a State's invocation of the Eleventh Amendment when the State files claims in an action brought under the Limitation of Shipowner's Liability Act of 1851, 46 U.S.C. App. 181-196 (1994 & Supp. II 1996).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20[1]) is reported at 147 F.3d 1344. The order of the district court (Pet. App. 21-24) is unreported.

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[1] All references to "Pet. App." herein refer to the Appendix to the petition filed in No. 98-682, unless otherwise noted.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1998. The petition for a writ of certiorari in No. 98-682 was filed on October 26, 1998. The petition for a writ of certiorari in No. 98-752 was filed on October 28, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Limitation of Shipowner's Liability Act of 1851 (Limitation Act), 46 U.S.C. App. 181-196 (1994 & Supp. II 1996), allows a shipowner to limit his or her liability with respect to claims arising out of a vessel casualty, not involving death or personal injury, to the post-accident value of the ship plus "her freight then pending." 46 U.S.C. App. 183(a). Paragraph (1) of Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims (Rule F) provides that, within six months of receiving a claim in writing, "any vessel owner may file a complaint in the appropriate district court, as provided in subdivision (9) of this rule, for limitation of liability pursuant to statute." Paragraph (2) of Rule F provides that "[t]he complaint shall set forth the facts on the basis of which the right to limit liability is asserted and all facts necessary to enable the court to determine the amount to which the owner's liability shall be limited."

If the vessel owner complies with the requirements for timely filing of a complaint, "all claims and proceedings against the owner or the owner's property with respect to the matter in question shall cease." Rule F(3). The court then has the authority to issue notice to all claimants with respect to which the vessel owner seeks limitation of liability, Rule F(4), to require the filing of claims in a single consolidated procedure,

Rule F(5), and, upon determining the vessel owner's liability, to award pro rata shares to the claimants "in proportion to the amounts of their respective claims," Rule F(8). The procedure provides a "concursus" of all claims against the vessel owner arising out of claims consistent with limitations on vessel owner liability provided by statute.

b. In 1990, Congress enacted the Oil Pollution Act (OPA), 33 U.S.C. 2701 *et seq.* (1994 & Supp. II 1996). That legislation followed the catastrophic marine and environmental disaster involving the *Exxon Valdez*, which accidentally discharged more than 11 million gallons of crude oil into Prince William Sound, Alaska. The OPA provides a comprehensive liability scheme for oil spills, applying to cases arising from such accidents, "[n]otwithstanding any other provision or rule of law." 33 U.S.C. 2702(a). Under the OPA, "each responsible party for a vessel or a facility from which oil is discharged * * * is liable for the removal costs and damages." 33 U.S.C. 2702(a). Included in the definition of "responsible party" are vessel owners, operators, and demise charterers. 33 U.S.C. 2701(32)(A).

In addition to changing the parties liable for oil spill damages, the OPA also abandons the Limitation Act's value-of-the-vessel-plus-pending-freight liability formula. "[T]he OPA contemplates a strict liability regime with statutory limits of at least $2 million for tanks vessels and $.5 million for all other vessels. 33 U.S.C. §§ 2702, 2704. Moreover, in certain instances, the OPA imposes virtually unlimited liability on the responsible party. *See* 33 U.S.C. § 2704(c)." *In re Metlife Capital Corp.*, 132 F.3d 818, 822 (1st Cir. 1997), cert. denied, 118 S. Ct. 2367 (1998). Moreover, the OPA liability provisions do not affect the imposition of addi-

tional liability under "State law, including common law." 33 U.S.C. 2718(a)(2).

2. This litigation arises from a collision between a freighter and two tugs in Tampa Bay on August 10, 1993. Pet. App. 4. In the aftermath of the collision, the owners of the three vessels filed petitions under the Limitation Act, 46 U.S.C. App. 183(a). The vessel owners sought exoneration from, or limitation of, liability for damages caused by the collision. Pet. App. 4-6. The district court issued injunctions pursuant to the "concursus" procedure of Rule F and consolidated the three limitations actions with four other cases arising out of the collision. Pet. App. 7.

With all of its claims cognizable in an action brought under the OPA, the United States filed protective claims in these Limitation Act proceedings initiated by the vessel-owner petitioners and then moved to dismiss, without prejudice, on the ground that its OPA claims could be asserted independently of the Limitation Act/Rule F proceedings. The district court granted that motion. Pet. App. 22.

Petitioner Department of Environmental Protection of Florida (Florida) moved to dismiss on the ground that the district court lacked jurisdiction, in light of the Eleventh Amendment, to adjudicate the State's rights arising from the accident. The district court granted that motion. Pet. App. 22-23.[2]

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[2] Initially, the district court had ordered the parties, including Florida, to engage in mediation. The Eleventh Circuit reversed that ruling, however, and remanded the case to the district court for a prompt ruling on Florida's claim of Eleventh Amendment immunity. See *Bouchard Transp. Co.* v. *Florida Dep't of Envtl. Protection*, 91 F.3d 1445, 1448-1449 (11th Cir. 1996).

3. The court of appeals affirmed in part, reversed in part, and remanded for additional proceedings. Pet. App. 19-20. The court first addressed the State's claim of immunity under the Eleventh Amendment. See *id.* at 9-11. The court analogized a Limitation Act proceeding to an admiralty *in rem* action, in which the court has jurisdiction over the res and claimants file claims to it: "Like an in rem proceeding, the plaintiffs in the limitation proceeding neither named any specific entities as defendants in their complaints nor formally served process on any defendants." *Id.* at 10. Rather, "the plaintiffs posted security bonds with the district court in the amount of their maximum liability and the district court notified potential claimants to make their claims on the res deposited with the district court." *Id.* at 11. Invoking *California* v. *Deep Sea Research, Inc.*, 118 S. Ct. 1464 (1998), the court of appeals held that Florida's Eleventh Amendment immunity did not apply in this Limitation Act case because the suit is "sufficiently analogous" to an *in rem* proceeding. Pet. App. 10-11.

The court of appeals then addressed whether Rule F concursus procedures apply to claims brought pursuant to OPA. The court gave two reasons for holding that OPA claims are not subject to Rule F concursus: "(1) OPA 90 claimants do not face a limited fund necessitating a pro rata distribution; and (2) Congress has specifically set forth procedures to implement the strictures of OPA 90." Pet. App. 12. The court concluded that, in cases involving maritime oil spills, Congress intended for OPA to override the Limitation Act's liability provisions and to accomplish the statutory aim of establishing liability for oil spill removal costs "without the assistance of Rule F." *Id.* at 14.

ARGUMENT

The decision of the court of appeals is correct with respect to both its Rule F and Eleventh Amendment holdings, and does not conflict with any decision of this Court or any court of appeals. Accordingly, further review is unwarranted.

1. The vessel-owner petitioners (No. 98-682) contend that, even with respect to claims that are not cognizable under the Limitation Act, the procedural requirements of Rule F (or some new concursus rule to be created by this Court) should be applied to this case. That argument is incorrect.

The Limitation Act allows a vessel owner to limit his or her liability with respect to claims arising out of a vessel casualty, not involving death or personal injury, to the post-accident value of the ship plus "her freight then pending." 46 U.S.C. App. 183(a). Congress, however, has prescribed a different scheme for liability in those maritime accidents causing the discharge of crude oil or refined petroleum products; that more specific statutory scheme supersedes the Limitation Act with respect to this class of cases. See *In re Metlife Capital Corp.*, *supra*.[3] The vessel-owner petitioners, in fact, do not challenge the premise that the substantive scheme of liability set forth in the Limitation Act does not apply to this litigation.

Rule F was adopted to implement the Limitation Act. Even though the substantive liability provisions of the

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[3] The courts of appeals have reached similar conclusions on the interplay between the Limitation Act and the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, *In re Oswego Barge Corp.*, 664 F.2d 327, 340 (2d Cir. 1981), and the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. 1651 *et seq.*, *In re Glacier Bay*, 944 F.2d 577, 583 (9th Cir. 1991).

Limitation Act do not apply here, petitioners nevertheless seek to impose the Rule F "concursus" procedure on this OPA case. That proposition lacks merit. As the court of appeals concluded, Congress has expressly provided procedures for OPA litigation and those procedures are incompatible with Rule F. Pet. App. 14-15. See also *In re Metlife*, 132 F.3d at 823-824.

Petitioners (No. 98-682 Pet. 12) express concern that there "may" not be sufficient means to protect them from incurring liability that exceeds the limits set forth in the OPA. Parties in OPA litigation, however, may invoke the same procedures generally available to litigants in the federal court system: consolidation under Federal Rule of Civil Procedure 42; transfer for *forum non conveniens* under 28 U.S.C. 1404(a); and multidistrict litigation under 28 U.S.C. 1407. Speculation that those traditional tools will prove to be inadequate is premature and does not provide any basis for further review.[4]

2. Petitioner Department of Environmental Protection of Florida (No. 98-752 Pet. 6-9) contends that the Eleventh Amendment obviates the need for a State to participate in a Limitation Act proceeding that will adjudicate the claims of liability of the vessel owner, upon pain of forfeiting that State's claims. The court of

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[4] Moreover, the vessel owners' fears are even more speculative than they acknowledge. The vessel-owner petitioners' argument is based on the untested assumption that they are protected by the OPA's dollar-per-ton liability limits under 33 U.S.C. 2704(a)(1) (1994 & Supp. II 1996). The OPA's liability limits are not always available to a responsible party and, in this litigation, the government maintains that none of the vessel-owner petitioners qualifies for the OPA limitation due to their alleged violations of federal safety rules. See 33 U.S.C. 2704(c)(1)(B). That question has not yet been addressed by the district court.

appeals correctly rejected that argument. For purposes of the Eleventh Amendment claim being asserted by the State, there is no material difference between a Limitation Act proceeding that determines various claimants' interests in liability apportionment and an *in rem* proceeding that determines claimants' ownership interests. Both types of disputes involve invocations of federal admiralty jurisdiction. Like an *in rem* proceeding, the Limitation Act action seeks no property or funds that are in the State's possession; rather, the vessel owner seeks a declaration from the court limiting or exonerating it from liability. The policies favoring unitary admiralty jurisdiction, see *Deep Sea Research*, 118 S. Ct. at 1470, are equally present in the Limitation Act context and the putative threat to a State's Eleventh Amendment immunity is equally absent. Although the Limitation Act has been on the books for nearly a century and a half, this apparently is the first time a court of appeals has confronted an Eleventh Amendment challenge by a State to the concursus procedure. See No. 98-752 Pet. 9; Pet. App. 9 n.3.

3. In addition, Petitioner Department of Environmental Protection of Florida (98-752 Pet. 9-11) argues that the vessel owners' pursuit of counterclaims against the State is barred under the Eleventh Amendment. That claim, however, was not passed on by the court of appeals. The court of appeals' silence on the issue may have stemmed from the State's failure to specify its arguments regarding the counterclaims as a separate

issue.[5] Florida could have sought rehearing in the court of appeals, bringing that possibly overlooked argument to the court's attention, but it did not. See Fed. R. App. P. 40. Nor does the State offer any conflicting decision by any other court on the issue. Accordingly, even if the court erred in having failed to consider separately the Eleventh Amendment implications of counterclaims brought against the State in a concursus proceeding, this case would not be a suitable vehicle for considering that issue.

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[5] The Statement of the Issues in Florida's brief as appellee (filed in 11th Cir., Nos. 96-3494, et al., at 12) framed the issues as follows:

> I. Whether the Eleventh Amendment immunity of a State from suit in federal court applies in the context of an admiralty limitation of liability proceeding.
>
> II. Whether vessel owners may use the admiralty limitation of liability procedures of Supplemental Rule F to circumvent the Oil Pollution Act of 1990 with regard to claims arising out of an oil spill in Florida waters.
>
> III. Whether the injunctions against prosecution of claims against the vessel owners and their vessels outside of the limitation cases should be enforced even if the use of Supplemental Rule F is limited.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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